STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ANDREW DOUGLAS WOODS,

Defendant-Appellee.

UNPUBLISHED
May 18, 2010

No. 290976
Livingston Circuit Court
LC No. 08-017474-FH

Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order suppressing evidence and dismissing the case. We vacate and remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was bound over for trial on a charge of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(*iii*), after a police officer discovered a shoebox containing marijuana, cash, and a list of names in defendant's van parked at an ice arena.

In the circuit court, however, defendant challenged the seizure of that evidence on constitutional grounds. The court convened an evidentiary hearing to decide the question. At the hearing, the arresting police officer testified that he went to the ice arena in response to information received from another officer, who indicated that a confidential informant reported that defendant would be selling marijuana there. The officer described finding a group of 20 to 30 young adults in the parking lot, defendant among them. According to the officer, defendant initially stated that he had come to the location in a car someone else had driven. The officer obtained permission to search that vehicle, but found nothing. The officer then called for additional information, and was told that the informant had reported that defendant sold marijuana from a shoebox out of a white van. The officer testified that there was a white van nearby, but that defendant denied that it was his. According to the officer, defendant consented to his searching for keys, upon which the officer found a key whose labeling match that of the van. Defendant then admitted that the key was to the white van. The officer testified that defendant then consented to a search of the van, which turned up the contraband.

Defendant testified, not that the officer asked if he might search for a key, but that the officer instead simply reached into defendant's pocket and retrieved it. Defendant further testified that the officer never asked for, and defendant never gave, permission to search the van.

The circuit court resolved the conflicting testimony concerning consent by concluding that defendant did not consent to the search, and on that basis granted the motion to suppress the evidence.

Plaintiff moved for reconsideration on the ground that although the question of consent to search had been decided, the question of probable cause to search the van without consent had not. The circuit court observed that the van was, at the time pertinent, not susceptible to being moved and that the police had its key. The trial court concluded that the police could have readily obtained a warrant. The written order that followed denied the motion for reconsideration, reaffirmed the original decision, and dismissed the case, "for the reasons stated on the record." Plaintiff filed a second motion for reconsideration, seeking a ruling that the automobile exception to the search-warrant requirement applied and, thus, that the arresting police officer had authority to search the van without consent. The circuit court denied the motion on the ground that the court rules did not "provide for filing of multiple motions for reconsideration." This appeal followed.

We review "de novo a trial court's ultimate decision on a motion to suppress," but review for clear error "the trial court's underlying findings of fact . . . ." *People v Beuschlein*, 245 Mich App 744, 748; 630 NW2d 921 (2001).

On appeal, plaintiff does not challenge the finding below that the search of the van took place without defendant's consent. Instead, plaintiff argues that the circuit court erred in concluding that a warrant was required because the police had the opportunity to obtain one and requests a remand to determine the question of probable cause for that purpose.

The federal and state constitutions guarantee the right to be free from unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. Evidence obtained in the course of a violation of a suspect's rights under the Fourth Amendment is subject to suppression at trial. *People v Cartwright*, 454 Mich 550, 557-558; 563 NW2d 208 (1997); see also *Mapp v Ohio*, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961) (incorporating the Fourth Amendment against the states under the Fourteenth Amendment). To be reasonable, a search must follow from probable cause. *People v Lewis*, 251 Mich App 58, 69; 649 NW2d 792 (2002). A valid warrantless search further requires one or another approved exigent circumstance, one of which is the automobile exception, in accord with which "the police may lawfully search an automobile without a warrant where they have probable cause to believe that the vehicle contains contraband." *People v Carter*, 194 Mich App 58, 60-61; 486 NW2d 93 (1992). For this purpose, the question is "whether the facts and circumstances known to the officers would warrant a person of reasonable prudence to believe that evidence of a crime or contraband sought is in a state place." *Id.* at 61.

Defendant argues that, as the circuit court found, because the subject van was parked and the police had the key, there was no risk of immediate movement, and thus the police were not entitled to search, even upon probable cause, without a warrant. Defendant relies on *People v White*, 392 Mich 404; 221 NW2d 357 (1974), where our Supreme Court held that the automobile exception did not apply to a warrantless search of a parked and unoccupied automobile where the police presence was sufficient to guard the vehicle while a warrant was obtained. *Id.* at 417-418.

However, as plaintiff points out, after *White* was decided, the United States Supreme Court held that the automobile exception applied to allow the warrantless search, upon probable cause, even of a vehicle in police custody. *Florida v Meyers*, 466 US 380, 382; 104 S Ct 1852; 80 L Ed 2d 381 (1984). The Court reiterated, "'the justification to conduct such a warrantless search does not vanish once the car has been immobilized.'" *Id.*, quoting *Michigan v Thomas*, 458 US 259, 261; 102 S Ct 3079; 73 L Ed 2d 750 (1982).

This Court, citing *Meyers* and related authority, held that that even a vehicle whose engine did not work was still mobile in that it could be towed. *People v Carter*, 250 Mich App 510, 514-515; 655 NW2d 236 (2002). In this case, there was no evidence that the parked van was other than fully mechanically mobile. Indeed, the only thing that rendered it immobile at the moment was the officer's possession of defendant's key. The van was not impounded or in the exclusive possession of the police, and there was no evidence to suggest whether others might have had keys that would have permitted them to access or move the vehicle. Given that the inoperable vehicle in *Carter* was not considered immobile, this operable van certainly should not be considered so. Accordingly, we hold that the circuit court in this case erred in concluding that a warrant was required simply because the police had seized control of the van.

Defendant alternatively argues that, even if the automobile exception does apply, the police improperly searched the van without probable cause. However, the circuit court never ruled on the question of probable cause. That being such a fact-sensitive question, we decline to decide the matter from the appellate record. Instead, this issue should be decided in the first instance by the circuit court. Accordingly, we vacate the order granting the motion to suppress and dismissing this case, and remand this case to the circuit court with instructions to apply the automobile exception and to determine whether probable cause existed to justify the warrantless search that took place in this instance.

Vacated and remanded for further proceedings. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Pat M. Donofrio